

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

IN THE MATTER OF)

DOWNEAST ENERGY CORP.)

Brunswick, Maine,)

Respondent)

Docket No. CWA-01-2009-0054

**CONSENT AGREEMENT AND
FINAL ORDER FOR CLASS II CIVIL
PENALTY UNDER SECTION
311(b)(6)(B)(ii) OF THE
CLEAN WATER ACT**

The Regional Administrator of the United States Environmental Protection Agency, Region I (“EPA”), issues this Consent Agreement and Final Order (“CAFO”) to Downeast Energy Corp. (“Respondent”). EPA alleges that Respondent violated Section 311(j) of the Clean Water Act (the “Act”). The parties agree to resolve this action by the issuance of this CAFO as provided under 40 C.F.R. § 22.13(b) of EPA’s “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation, Termination or Suspension of Permits,” 40 C.F.R. Part 22 (“Part 22 Rules”).

I. DESCRIPTION OF VIOLATIONS

1. EPA alleges that Respondent failed to comply with the Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112 under the authority of Section 311(j) and other provisions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

Statutory and Regulatory Authority

2. EPA takes this action under the authority of Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), for violation of Section 311(j) of the Act, 33 U.S.C. § 1321(j).

General Allegations

3. Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), provides that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore and offshore facilities, and to contain such discharges”

4. Under the authority of Section 311(j)(1) of the Act, the Oil Pollution Prevention regulations establish procedures, methods, and requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products that, due to their location, could reasonably be expected to discharge oil in harmful quantities (as defined in 40 C.F.R. Part 110) to navigable waters of the U.S. or adjoining shorelines.

5. Under 40 C.F.R. § 112.3 an owner or operator of an onshore facility subject to the Oil Pollution Prevention regulations must prepare a Spill Prevention Control and Countermeasure (“SPCC”) Plan in writing in accordance with 40 C.F.R. § 112.7, and fully implement such plan.

6. Respondent is a “person” within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7), 1362(5).

7. Respondent is the “owner or operator” within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), of an oil storage and distribution facility located at 288 River Rd., Springvale, Maine (“Springvale Facility”), and at 95 College Avenue, Waterville, Maine (“Waterville Facility”).

8. Respondent is engaged in storing, using, and consuming “oil” or oil products located at each Facility within the meaning of 40 C.F.R. § 112.2.

9. Each Facility has an aggregate above-ground storage capacity greater than 1,320 gallons of oil in containers each with a shell capacity of at least 55 gallons.

10. Each Facility is an “onshore facility” within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

11. Each Facility is a “non-transportation-related” facility within the meaning of 40 C.F.R. § 112.2 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

12. “Navigable waters” of the United States are defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1.

13. Based on the above, each Facility is therefore a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable waters of the United States or its adjoining shorelines in a harmful quantity.

14. Respondent is therefore subject to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112 at each Facility.

Findings of Violation

15. On December 18, 2008 an authorized EPA representative inspected the Springvale Facility to determine compliance with Section 311(j) of the Act, and in particular, the requirements of the Oil Pollution Prevention regulations. EPA obtained information related to the Waterville Facility in response to an Information Request issued to Respondent.

16. Based on these inspections and on documents submitted by Respondent to EPA subsequent to the inspection, EPA identified the following violations:

Failure to Prepare and Implement SPCC Plans

17. Respondent had failed to fully implement an SPCC plan at each Facility in accordance with the provisions of 40 C.F.R. § 112.7 in violation of 40 C.F.R. § 112.3.

18. Respondent's failure to fully implement an SPCC plan for each Facility violated 40 C.F.R. § 112.3. Respondent is in violation of these requirements each day beginning with the period it was required to implement a plan under 40 C.F.R. Part 112, and ending when it fully implements a written, Professional-Engineer certified, SPCC Plan for the Facility consistent with all the requirements of 40 C.F.R. Part 112, or until it no longer owns or operates the Facility, or until the Facility is "permanently closed" in accordance with 40 C.F.R. § 112.2.

19. As alleged in the preceding paragraph, and pursuant to Section 311(b)(6)(B)(ii) of the Act and 40 C.F.R. § 19.4, Respondent is liable for civil penalties of up to \$11,000 per day for each day during which the violations continue for violations occurring between March 15, 2004 and January 12, 2009, and \$16,000 per day for each day during which the violations continue, for violations occurring after January 12, 2009.

II. CONSENT AGREEMENT

EPA and Respondent agree that the above matter constitutes a disputed claim and that settlement of the above matter is in the public interest, and that entry of this CAFO without litigation is the most appropriate means of resolving this matter. Therefore, before taking any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the parties to this action hereby stipulate as follows:

20. Respondent admits the jurisdictional allegations in Section I above.

21. Respondent neither admits nor denies the specific factual allegations contained in Section I above.

Waiver of Rights

22. Respondent waives the right to a hearing under Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), to appeal any Final Order in this matter under Section 311(b)(6)(G)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(G)(ii), and consents to the issuance of a Final Order without further adjudication.

Penalty

23. Complainant proposes, and Respondent consents to, the assessment of a civil penalty of ONE-HUNDRED FIFTY-SEVEN THOUSAND FIVE-HUNDRED DOLLARS (\$157,500)

Payment Terms

24. Based on the foregoing, the parties, in their own capacity or by their attorneys or authorized representatives, hereby agree that:

25. Within 30 days of the effective date of the Final Order, Respondent shall submit a cashier's or certified check, payable to "Environmental Protection Agency" and referencing the title and docket number of the action ("In the Matter of Downeast Energy, Docket No. CWA-01-2009-0054") and "Oil Spill Liability Trust Fund - 311" in the amounts specified in Paragraph 23 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

26. Respondent shall note on the penalty payment check the title and docket number of this case. Respondent shall submit copies of the check to the following people:

Wanda Santiago
Regional Hearing Clerk (RAA)
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

and

Jeffrey Kopf
Office of Environmental Stewardship (SEL)
U.S. Environmental Protection Agency
Region I
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

27. The proposed administrative civil penalty has been determined in accordance with Section 311(b)(6)(B)(ii) of the Act and 40 C.F.R. § 19.4, and Section 311(b)(8) of the Act. For purposes of determining the amount of any penalty to be assessed, Section 311(b)(8) requires EPA to take into account the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require. In developing the proposed settlement penalties in this CAFO, Complainant has taken into account the particular facts and circumstances of this case with specific reference to the factors identified at Section 311(b)(8) of the Act.

28. The penalty above represents a civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

General Provisions

29. Pursuant to Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H), failure by the Respondent to pay the penalty amounts relating to the CWA violations assessed by this CAFO in full by the date required shall subject the Respondent to a civil action to collect the assessed penalty, plus interest at the prevailing rates from the effective date of the CAFO. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Further, under Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H), if Respondent fails to pay on a timely basis any CWA penalty payment assessed by this CAFO, Respondent shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter. Interest will be assessed pursuant to 31 C.F.R. § 901.9(b), promulgated pursuant to 31 U.S.C. § 3717. The Final Order shall be binding upon Respondent and Respondent's officers, directors, agents, servants, employees, and successors or assigns.


30. EPA states that it has provided a thirty day opportunity for public notice and comment on this proposed CAFO pursuant to Section 311(b)(6)(C)(i) of the Act, 33 U.S.C. § 1321(b)(6)(C)(i), and 40 C.F.R. § 22.45(b), and has not received any public comments.

31. The Final Order does not constitute a waiver, suspension or modification of the requirements of Section 311 of the Act, 33 U.S.C. § 1321, or any regulations promulgated thereunder, and does not affect the right of the Administrator or the United States to pursue any applicable injunctive or other equitable relief or criminal sanctions for any violation of law. Payment of the penalty pursuant to this Consent Agreement resolves only Respondent's liability for federal civil penalties for the violations and facts stipulated to herein.

32. Except as described in paragraph 29 of the Consent Agreement, each party shall bear its own costs and attorney's fees in connection with the action resolved by this CAFO.

FOR DOWNEAST ENERGY CORP.:

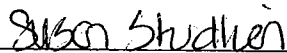
Date: 5/29/09



John Peters, President
Downeast Energy Corp.

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: 06/03/09



Susan Studlien, Director
Office of Environmental Stewardship
U.S. EPA, Region 1

III. FINAL ORDER

33. In accordance with 40 C.F.R. § 22.18(b), the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order.

34. Respondent is ordered to comply with the terms of the referenced Consent Agreement. This Final Order shall become effective 30 days from today pursuant to Section 311(b)(6)(D) of the CWA, 33 U.S.C. § 1321(b)(6)(D).

Date: _____

LeAnn Jensen
Acting Regional Judicial Officer
U.S. Environmental Protection Agency, Region 1